No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,

Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY,

Appellees.

G. de BRETTEVILLE and TREASURE COMPANY,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

Reply of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward to Reply Brief of Adamant Company and Walter B. Scoville, Appellees.

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I.

The State Court Action Is Immaterial.

The appellees refer, on pages 1 and 14 of their reply brief, to a State Court action filed in 1939 by the appellants, in which they sought to enforce the two for one agreement. The record in that case is not in evidence before this Court, but it may be said, in answer to any implications which the appellees may be suggesting, that service was had upon The Adamant Company and Treasure Company in that case; that Scoville was not served; and that after the condemnation by the Federal Government, which took the property out of the jurisdiction

of the State Court, counsel paid no attention to that case until recently. The case has been recently dismissed as against Scoville for lack of prosecution, it appearing that he came into California and resided here for more than five years, and so could have been served. The action was also dismissed as against Treasure Company, on the ground that the decision of this Court in the condemnation case was *res judicata* as to it. The case was tried on April 9, 1956, as to The Adamant Company, and judgment for the defendant has been directed by the Court, but not signed or entered. The ground of decision does not appear from the notice given by the Clerk. It may well be that the Court was of the view that the obligation was secured by the interests in production of the parties to the agreement, but that there was no personal liability. Following the condemnation the State Court could, of course, give only a personal judgment. In any event, the judgment is not final, the record is not before this Court, and it would seem that the case, therefore, should have no bearing on the decision of the Court in the case at bar.

II.

The Amount of Prior Production Is Immaterial.

In *Recovery Oil Co. v. Van Acker,* 96 Cal. App. 2d 909, 216 P. 2d 483, the document involved entitled the holder to the proceeds of 15% of the oil saved and sold until the sum of $10,000.00 had been paid. The point was made in that case, also, that the production had been such that 15% of it would have paid the indebtedness. The Court held that this was immaterial, and that the security continued against the interest in the property of the person who signed the document. At page 485 of the report in 216 P. 2d, the Court says:

> "Finally, the appellant contends that the Court erred in refusing to permit it to prove, by the testimony of a Supervisor of the State Division of Oil and Gas, that the production of oil on the leased premises prior to four years before this action was filed was sufficient, at market prices, to have enabled respondent's claim to have been paid in full. It is argued that . . . the testimony . . . would have established that the respondent could have been paid prior to 1941; that it follows that her claim was barred by the statute of limitations; . . ."

The Court ruled against the appellant on this point, and said on the same page:

> "No date was fixed for the termination of her interest and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money."

The same point was raised in *Phillips Petroleum Co. v. Gable,* 128 F. 2d 943, where, as in the case at bar, payment was to be made out of the first proceeds of a certain percentage of production, and the Court held that the lien continued against the remaining property interest of the person who entered into the undertaking, regardless of the amount of prior production.

III.

The Appellants' Money Went Into the Completion of the Well.

The appellees say, at page 2 of their brief, that there is no evidence to sustain the statement in the Bullen and Hayward brief that the $13,000.00 included the $5,000.00 put up by the appellants. The Court found that the money put up by these appellants "was used as part of the funds by which said oil well, Treasure Well No. 8,

was placed on production . . ." [Tr. 106.] The checks given by these appellants bear the endorsement of G. de Bretteville, for the Treasure Company Trust Fund [Pltfs.-in-Intervention Ex. B-3], as well as the endorsement of George Halverson, to whom they had been sent, and who was then representing Scoville and The Adamant Company in a controversy with de Bretteville and Treasure Company. Scoville wrote to the appellants that the controversy had been composed, and that the moneys would be paid over. [Tr. 195.] de Bretteville testified that the money was received from Bullen and Hayward, although denying that he or his company knew anything about the agreement to repay it two for one. [Tr. 221.]

IV.

The Testimony of Mr. Bullen Does Not Have the Effect Contended for by the Appellees.

The appellants, at page 2 of their brief, refer to certain testimony by Mr. Bullen, and at page 9 contend that it constitutes an admission that there was no charge against anyone's interest in the well. The testimony of Mr. Bullen was simply that payment of the money was to come out of production from the well. His statement that it was not to be charged against any particular interest simply means that the charge was to be borne pro rata by everyone who was a party to the agreement, and appellants have conceded that their 2% participating royalty interest should bear a part of the charge. So far as Mr. Bullen knew, all the holders of the working interest had agreed to the proposition. He knew that there was a dispute between Scoville and de Bretteville, but, as above noted, Scoville wrote him that they had reached an agreement. [Tr. 195; Pltfs.-in-Intervention Ex. B-2.]

V.

The Lien of the Two for One Agreement Is Not Res Judicata by Virtue of the Condemnation Judgment.

It is believed that the other points have been sufficiently covered by appellants' brief, and no useful purpose would be served by continuing the argument about the statute of limitations and *res judicata.*

On the latter point, however, it seems to be suggested at page 12 of appellees' brief that we are wrong in our contention as to the limited jurisdiction of the Federal Court in a condemnation matter. Whether rightly or wrongly, this Court held in the condemnation case that it could not adjudicate the rights of royalty holders, from which it necessarily follows that it could not adjudicate the rights of creditors of such royalty holders. Even if this Court should later decline to follow its holding in that respect, the holding prevents the ruling, if any, on the merits of the two for one agreement from being *res judicata.* The Restatement of Judgments, Sec. 67, states:

> "Where in an action the court holds that the plaintiff cannot enforce a particular claim in that action on the ground that he can enforce it only in a separate action, the judgment does not preclude the plaintiff from enforcing the claim in another action, although in the second action it appears that the holding of the court in the first action was erroneous."

It may be noted, however, that the condemnation case is not the first case in which this Court has held that royalty holders are to be treated as stockholders. *In re Lathrap,* 61 F. 2d 37, was a bankruptcy of the lessee of an oil lease, and it was held that creditors of the enterprise, *i. e.,* those who had made advances for the development of property, had priority over royalty holders.

VI.

The Adamant Company, as Well as Scoville, is Bound by the Two for One Agreement.

We do not wish to prolong this discussion, but in reference to the statement on page 13 of the appellees' brief that there was no evidence that The Adamant Company authorized the signing of the agreement by a resolution of its directors, it is believed that the Court will take judicial notice of the fact that if formal resolutions were always required to bind corporations to their obligations, it would be very difficult to do business, and that probably 90% of corporate obligations are not supported by directors' resolutions.

As to the point that no officer of The Adamant Company testified, this could easily have been remedied by its counsel, and it is submitted that a *prima facie* case of duly authorized execution of the contract was established.

Conclusion.

One further point which should perhaps be noted is the statement on page 11 of appellees' brief that "The condemnation jury award is no part of the production of the well as the production was $205,411.68 received by de Bretteville and Treasure Co." Under the age-old principle that an agreement to pay a sum of money out of the production of real property creates a lien, at least in equity, upon the property itself, or the interest of the obligor in such property, it is submitted that the two for one agreement created a lien against the property, to wit, the royalty interests of Scoville and The Adamant Company. The jury award stands in lieu of that property interest, and no authority is needed for the proposition

that if there was a lien against the property, the lien persists against the award. Actually, this award was based upon expert testimony as to the net value, as of the date of taking, of the estimated future oil production from the well, and so, in a very real sense, it represents production. As noted under Point II above, the fact that prior production had been sufficient to satisfy the lien is immaterial.

Respectfully submitted,

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